



INTERIOR BOARD OF INDIAN APPEALS

Estate of Lucinda Shelton Joe

5 IBIA 20 (02/04/1976)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF LUCINDA SHELTON JOE

IBIA 75-71

Decided February 4, 1976

Appeal from an order amending Order Approving Will and Decree of Distribution.

Affirmed.

1. Indian Probate: Indian Reorganization Act: Generally

The Indian Reorganization Act recognizes two classes of persons who may take testator's lands by devise, that is, any member of the tribe having jurisdiction over such lands and legal heirs of the testator.

APPEARANCES: Gary T. Jones, Esq., for appellant, Norma Johnston.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

Decedent, an enrolled member of the Swinomish Tribe died testate on March 25, 1974, leaving as her sole devisee William David Joe (enrolled member of the Swinomish Tribe), nephew of decedent's husband, Joseph Joe, who predeceased her. The decedent's heirs at law were found to be Grace Jordan Miller, cousin, 1/3; Marie G. Sneatlum, cousin, 1/3; and Charles A. Sneatlum, cousin, 1/3.

Administrative Law Judge Robert C. Snashall on February 14, 1975, issued an Order Approving Will and Decree of Distribution wherein he determined William David Joe to be the sole devisee. It subsequently came to light that certain of the land included in the Decree of Distribution, specifically referred to as Tract No. 123-48B (Mary Ann Shelton), described as S 1/2 S 1/2 SW 1/4-2-30N-4E consisting of 40 acres, was located on the Tulalip Reservation.

The heirs at law filed a petition for rehearing contending the aforementioned devisee was not entitled to take the 40 acres located on the Tulalip Reservation for the reason that it was violative of section 4 of the Indian Reorganization Act. 48 Stat. 985, 25 U.S.C. §464.

[1] Section 4 of the I.R.A. recognizes two classes of persons who may take testator's lands by devise. They are:

- 1) Any member of the tribe having jurisdiction over such lands, and
- 2) Legal heirs of the testator.

On April 2, 1975, the Judge issued an Order amending the Order Approving Will and Decree of Distribution of February 14, 1975. The Judge found William David Joe was neither a member of the Tulalip Tribe nor an heir at law of the decedent under the laws of the State of Washington. He further ordered that Tract No. 123-48B (Mary Ann Shelton) be distributed by intestate succession to the heirs at law referred to, supra.

A timely appeal was filed by Norma Johnston. The appellant in substance contends that William David Joe was an heir at law of the decedent. It was the appellant's contention that in the absence of a definition in the statute, an heir under a will must be given the same status as an heir at law.

The Solicitor was called upon to construe section 4 of the 1934 Act shortly after its enactment (54 I.D. 584, August 17, 1934). He had this to say of it:

The circumstances under which the phrase "or any heirs of such member" was inserted in the Wheeler-Howard Bill indicate the proper meaning to be attached to that phrase. Early drafts of the legislation (e.g., H.R. 7902, Title III, Sec. 5, April House Committee Print), both in the House and in the Senate, limited the privilege of inheriting restricted property to the members of the testator's tribe, in accordance with the fundamental purpose of the legislation to conserve Indian lands through the acquisition of parcels of such lands by persons not subject to the authority of the Indian tribe or reservation. To this limitation the objection was urged that in some cases the heirs of a deceased Indian would not be members of the tribe or corporation to which the deceased had adhered, and that it would be unfair to deny such natural heirs the right to participate in a devise of property. The House Committee on Indian Affairs, therefore, added to the clause first considered the phrase "or any heirs of such member." (H.R. 7902, Sec. 4, as reported to the House). Independently, the Senate Committee on Indian Affairs added to the draft under its consideration a parallel phrase more restricted in scope, "or the Indian heirs of such member."

(S. 2755, Sec. 4, Committee Print No. 2; S. 3645, Sec. 4, as reported to the Senate). It seems clear that the purpose of these legislative afterthoughts was not to alter fundamentally the intent and scope of the original restriction but rather to provide for the exigencies of a special case that had not been distinctly considered, namely, the case of an Indian testator desiring to divide his estate by will among those who would in the absence of a will, have been entitled to share in the estate, namely, his own heirs. 54 I.D. 585-6. See also, Estate of Emma Blowsnake Goodbear Mike, also known as Emma Walking Priest, IA-916 (October 26, 1960).

By member of the testator's tribe, the Act and the Solicitor were referring to "member of the tribe having jurisdiction over such land." The parcel in question was originally allotted to Mary Ann Shelton, a member of the Tulalip Tribe and mother of Lucinda Shelton Joe.

We concur in the construction placed upon section 4 of the 1934 Act by the Solicitor, supra, and in the opinion of the Administrative Law Judge that restricted Indian lands apart from being devised to a member of the Tulalip Tribe, may only be devised to a legal heir of the decedent. We find that devisee William David Joe was neither a member of the tribe nor a legal heir of the decedent.

The appellant further contends the Secretary of the Interior is estopped to deny the effectiveness of the will in question because of the inability of the testatrix to now cure the defects in the devise which was erroneously approved by an employee of the Bureau of Indian Affairs.

The record does not sustain the appellant's contention as to erroneous approval of the devise by employees of the Bureau of Indian Affairs and we so find.

Because the scrivener prepared a will, it cannot now be concluded that preparation amounted to approval. At most the scrivener's responsibility ended with her preparation of a will pursuant to the wishes of the testatrix in accordance with Departmental regulations. See 43 CFR 4.260.

Assuming the scrivener had erroneously approved the will, such error could not be imputed to the Secretary. It has been consistently held that unauthorized acts of employees of the Bureau of Indian Affairs cannot serve as a basis for conferring rights not authorized by law.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, IT IS ORDERED that the Order Approving Will and Decree of Distribution dated February 14, 1975, as amended by the Order of April 2, 1975, be, and the same is hereby AFFIRMED, and the appeal herein is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge